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8
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 10 STEVE TRACHSEL, an individual, SUN CITY
 11 TOWERS, LLC, a California corporation,
 12 THOMAS CIRRITO, an individual,
 13 ATOCHA LAND, LLC, a Delaware limited liability
 14 company, MICHAEL CIRRITO, an individual, and
 15 CIRRITO HOLDINGS, LLC, a Delaware limited
 16 liability company

17 UNITED STATES DISTRICT COURT - NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

19 STEVE TRACHSEL, an individual; SUN
 20 CITY TOWERS, LLC, a California
 21 corporation; THOMAS CIRRITO, an
 22 individual; ATOCHA LAND, LLC, a
 23 Delaware limited liability company;
 24 MICHAEL CIRRITO, an individual; and
 25 CIRRITO HOLDINGS, LLC, a Delaware
 26 limited liability company,

27 Plaintiffs,

28 v.

19 RONALD BUCHHOLZ; CHARICE
 20 FISCHER; RDB DEVELOPMENT, LLC,
 21 a Nevada limited liability company;
 22 SOLOMON CAPITAL, INC., a Nevada
 23 corporation; JONATHON VENTO;
 24 GRACE CAPITAL, LLC, dba GRACE
 25 COMMUNITIES, an Arizona limited
 26 liability company; DONALD ZELEZNAK;
 27 Z-LOFTS, LLC, an Arizona limited
 28 liability company; ZELEZNAK
 PROPERTY MANAGEMENT, LLC dba
 KELLER WILLIAMS REALTY, an
 Arizona limited liability company;
 KELLER WILLIAMS REALTY, INC., a
 Texas corporation; and DOES 1-50,
 inclusive,

Defendants.

CASE NO. C08 02248RS

**PLAINTIFFS' REPLY TO OPPOSITION
 TO EX PARTE APPLICATION FOR
 TEMPORARY RESTRAINING ORDER**

**[FED. R. CIV. PROC. § 65, NORTHERN
 DISTRICT OF CALIFORNIA CIVIL
 LOCAL RULES 7-10 AND 65-1]**

Date:
 Time:
 Ctrm:
 Judge:

I.

INTRODUCTION

Plaintiffs STEVE TRACHSEL, SUN CITY TOWERS, LLC, THOMAS CIRRITO, an ATOCHA LAND, LLC, MICHAEL CIRRITO, and CIRRITO HOLDINGS, LLC (“Plaintiffs”) submit the following Reply to Defendants RONALD BUCHHOLZ, CHARICE FISCHER, RDB DEVELOPMENT, and SOLOMON CAPITAL, INC.’s (“Defendants”) Opposition to Plaintiffs’ *Ex Parte* Application for a Temporary Restraining Order. Defendants’ Opposition argues a delay in filing the complaint and the application, but is unaware of Plaintiffs’ efforts to informally resolve the matter and ensure that all parties had been duly served with process, as well as a recent urgency based on Defendants’ apparent unwillingness to proceed with expedited settlement negotiations.

Defendants' Opposition claims that there is no evidence supporting Plaintiffs' claim for success on the merits of its rescission claim, but overlooks the fact that this claim is clearly established by public information. Defendants' Opposition claims that the relief requested would prevent Defendants from further developing the property, but is apparently unaware that Defendants have never developed the property. Finally, Defendants claim that Plaintiff is unwilling to post a bond, but ignores Plaintiff's offer to do so in connection with its noticed motion on these same facts.

In light of Defendants' misunderstanding of the operative facts and urgency of the relief sought, the Court should grant Plaintiffs' application and issue an order preventing Defendants from depleting, concealing, or expending funds acquired from investors pending hearing on Plaintiffs' noticed motion, as well as prevent any destruction of evidence and any use of investor funds in defense of this action.

III.

ANALYSIS

A. Despite Defendants' Contentions, Emergency Relief is Needed in this Matter

Defendants' Opposition attempts to make much of an alleged "delay" in filing Plaintiffs' lawsuit and another alleged "delay" in filing the aforementioned ex parte application without

1 understanding any of the reasons therefor. Defendants first argue that Plaintiffs knew about the
2 “fraudulent enterprise” as of July 2007, but did not file a complaint until April 30, 2008.
3 Defendants overlook the difficulty involved in rallying several defrauded investors, consulting
4 with attorneys, marshaling relevant evidence, and drafting a comprehensive complaint.

5 Defendants next argue that Plaintiffs then waited until June 3, 2008 to file the instant
6 temporary restraining order. Again, Defendants are unaware that Plaintiffs had to wait until all
7 parties had been served or appeared in this matter so as not to violate any party’s right of due
8 process. (Declaration of Jesshill E. Love in support of Plaintiff’s Reply, ¶ 2.) In addition,
9 Defendants apparently ignore Plaintiffs’ initial efforts to resolve the matter informally, meeting
10 with Defendants’ counsel Andrew August to discuss an early mediation date to resolve the matter
11 in June. (Love Decl., ¶ 3.) When it became clear that Defendants were unavailable until mid- to
12 late July, Plaintiffs became concerned that Defendants were simply buying time to sequester the
13 investor funds. (Love Decl., ¶ 4.) Concerned that Plaintiffs’ investment funds would be rapidly
14 depleted and relevant information and documentation destroyed, Plaintiffs filed the application
15 without delay. (Id.) Based on this information, the application was filed as soon as it could have
16 been.

17 Defendants also argue that there is a lack of proof that Defendants are using Solomon
18 Towers investors’ monies to pay personal debts and obligations. The indisputable facts that
19 Defendants’ San Jose office was raided by government law enforcement authorities, that said
20 authorities seized the office’s contents on suspicion of the same acts alleged in the complaint, and
21 that Defendants Buchholz and Fischer are now facing a pending criminal indictment for the
22 alleged acts firmly establish that Plaintiffs’ allegations are not idly concocted.

23 This is not mere suspicion, nor is it speculative injury, as Defendants allege. Instead,
24 there is an urgent concern that Defendants will deplete, spend, or conceal the monies received
25 from Plaintiffs in order to frustrate Plaintiff’s reasonable efforts to resolve the matter through the
26 Courts. Because Plaintiffs filed this application as soon as possible given their informal
27 settlement discussions and efforts to serve all parties in this matter, and because there is ample
28 evidence to indicate an immediate and irreparable harm, this Court should grant Plaintiff’s ex

1 parte application for a temporary restraining order.

2 **B. Plaintiffs Are Likely to Succeed on the Merits of the Action**

3 Defendants next claim that Plaintiffs are unable to succeed on the merits of the action
 4 because they have only argued a single claim and have done so using hearsay evidence.

5 Defendants again misunderstand Plaintiff's limitation to a single claim. It was certainly possible
 6 to demonstrate the merits of all 18 claims for relief in the complaint. However, in an effort to
 7 consolidate the amount of material filed with the Court, Plaintiffs elected to argue an indisputable
 8 claim.

9 As Plaintiffs demonstrated in their moving papers, the investments that Defendants sold to
 10 Plaintiffs qualified as securities under both state and federal law. (S.E.C. v. Howey (1946) 328
 11 U.S. 293, 298; Silver Hills Country Club v. Sobieski (1961) 55 Cal.2d 811, 908; Cal. Comm'r of
 12 Corp. v. Fairshare (1998) OAH No. N 1998110288.) However, Defendants were not themselves
 13 qualified to sell these securities under federal or state laws. (Love Decl., ¶ 5.) This lack of
 14 qualification is easily verifiable by contacting various governmental securities regulations
 15 commissions. (Love Decl., Ex. "A".) Defendants have not disputed (and incidentally, cannot
 16 dispute) that they sold the aforementioned securities without being qualified to do so. (Love
 17 Decl., ¶ 5, Ex. "A".) Accordingly, Plaintiff does not need to tax the Court's attention any further
 18 to establish its potential success against Defendants on its claim for rescission.

19 Further, even if Plaintiffs had no other evidence than Mr. Trachsel's allegation, the Court
 20 could still rule in Plaintiff's favor and grant the application. Given the emergency nature of the
 21 requested temporary relief, the trial court has discretion to consider hearsay or otherwise
 22 inadmissible evidence. "The trial court may give even inadmissible evidence some weight when
 23 to do so serves the purpose of preventing irreparable harm before trial." (Flynt Distrib. Co., Inc.
 24 v. Harvey (9th Cir. 1984) 734 F.2d 1389, 1394; Heideman v. South Salt Lake City (10th Cir. 2003)
 25 348 F.3d 1182, 1188 ["The Federal Rules of Evidence do not apply to preliminary injunction
 26 hearings."].) Whether based on Mr. Trachsel's declaration or the numerous governmental
 27 documents showing no registration by Defendants, Plaintiffs have demonstrated the likelihood of
 28 success on its rescission claim, and the Court should grant Plaintiffs' request for a temporary

1 restraining order.

2 **C. The Relief Sought Is Reasonable Under the Circumstances**

3 Defendants argue that the relief requested is not temporary in nature. Once again,
4 Defendants appear to be unaware that concurrent with this ex parte application, Plaintiffs have
5 also filed a noticed motion for a Right to Attach Order and a Writ of Attachment, which will
6 address the same expenditures and documents following the normal notice period. Accordingly,
7 the relief requested will be necessarily limited by the Court's reconsideration of the same issue
8 following the notice period.

9 Defendants next allege that the relief requested "would effectively prevent Defendants
10 from proceeding with the development of the Solomon Towers at all." This statement evidences
11 counsel's lack of familiarity with the facts in this case. In the three years since this property was
12 purchased, the only thing that has developed on the property is dust. Defendants are not seeking
13 to develop the property, which is now seriously overleveraged and undercapitalized. In fact, one
14 of the areas of settlement discussion with Defendants was ensuring that they would not execute a
15 deed in lieu of foreclosure on the property. (Love Decl., ¶ 6.) Because no development efforts
16 are occurring, the Court's order cannot affect development of the property in any way and
17 preserves the status quo.

18 Further, Defendants claim that there is no basis for Plaintiffs' request that Defendants not
19 destroy any evidence. Once again, the fact that governmental authorities have already raided
20 Defendants' offices and boxed up its contents to prevent destruction of evidence should tell the
21 Court something regarding Plaintiffs' concerns. In addition to the evidence preserved by the raid,
22 there is certainly evidence that was not retained in the office and not taken in by the raid.
23 Plaintiffs simply seek to preserve this evidence as well, and the Court is entitled to enter an order
24 to this effect based on the general prohibition against spoliation of evidence.

25 In situations such as this one, where Plaintiffs are seeking to rescind a fraudulent sale and
26 recover the funds transferred, the Court may actually freeze all of a party's assets (rather than
27 simply specific assets enumerated) pending a final decision in the matter. Deckert v.
28 Independence Shares Corp. (1940) 311 U.S. 282, 290; Grupo Mexicano de Desarollo S.A. v.

Alliance Bond Fund, Inc. (1999) 527 U.S. 308, 324-325.) Based on the limited nature of the relief requested in Plaintiffs' application, it is evident that Plaintiffs are not engaging in gamesmanship as alleged in Defendants' Opposition. Instead, Plaintiffs are merely seeking to preserve the funds in dispute, and the Court should enter an order granting Plaintiffs' application on this basis.

D. Plaintiffs Are Willing to Post a Bond

Defendants' opposition next alleges that Plaintiffs are unwilling to post a bond. In fact, Plaintiffs are willing to post a bond, and have so indicated in their Motion for Right to Attach Order and Writ of Attachment. Of course, Plaintiffs are unable to post a bond in the prohibitive amount of \$1,000,000.00 because Defendants already took that money, and that purpose of this lawsuit is to get it back. However, if necessary, Plaintiffs are willing to post a bond in such sum as the Court deems proper.

E. Defendants Do Not Dispute Plaintiffs' Request that Defendants Be Enjoined from Using Investor Funds for the Defense of This Action

Interestingly, Defendants do not take issue with Plaintiffs' request that Defendants be prevented from using investor funds, including those acquired from Plaintiffs, to finance their defense of this action. Certainly, it would be unjust and nonsensical for a party to defend against recovery of funds using the funds sought to be recovered. The Court has discretion to forbid or limit payment of attorney fees out of funds in dispute pending trial. (Commodity Futures Trading Comm'n v. Noble Metals, Inc. (9th Cir. 1995) 67 F.3d 766, 774-775.) Whether through expenditures, concealment in other ventures, or simply use for attorney's fees, Defendants must not be allowed to further deplete and frustrate the legitimate ends of Plaintiffs' legal efforts. Accordingly, the Court should grant Plaintiffs' application and prevent Defendants from using Plaintiffs' own funds against them.

III.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant a Temporary Restraining Order (1) enjoining Defendants' continued expenditure of Solomon Towers, LLC

1 funds for Defendants' personal debts and obligations; (2) preventing alteration or destruction of
2 evidence, including, but not limited to, all corporate business and financial records for Solomon
3 Towers, Solomon Capital, RDB Development, and all other related companies in both written and
4 electronic format; and (3) preventing the use of Solomon Towers, LLC funds or other investor
5 funds for the defense of this action. Said Order will preserve the status quo until the Court has an
6 opportunity to hear Plaintiffs' noticed Application for a Right to Attach Order and an Order for
7 Issuance of a Writ of Attachment.

8 Dated: June 6, 2008

ROPER, MAJESKI, KOHN & BENTLEY

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TODD A. ROBERTS
JESSHILL E. LOVE
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MICHAEL CIRRITO, an individual, and
CIRRITO HOLDINGS, LLC, a Delaware
limited liability company

Ropers Majeski Kohn & Bentley
A Professional Corporation
Redwood City

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10 UNITED STATES DISTRICT COURT - NORTHERN DISTRICT OF CALIFORNIA

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 23 Z-LOFTS, LLC, an Arizona limited liability
 company; ZELEZNAK PROPERTY
 24 MANAGEMENT, LLC dba KELLER
 WILLIAMS REALTY, an Arizona limited
 liability company; KELLER WILLIAMS
 25 REALTY, INC., a Texas corporation; and
 DOES 1-50, inclusive,

27 Defendants.

28

RC1/5132112.1/BRL

CASE NO: C08 02248RS

**DECLARATION OF JESSHILL E.
 LOVE IN SUPPORT OF PLAINTIFFS'
 REPLY TO OPPOSITION TO EX
 PARTE APPLICATION FOR
 TEMPORARY RESTRAINING ORDER**

**[FED. R. CIV. PROC. § 65, NORTHERN
 DISTRICT OF CALIFORNIA CIVIL
 LOCAL RULES 7-10 AND 65-1]**

Date:

Time:

Ctrm:

Judge:

1 I, JESSHILL E. LOVE, declare:

2 1. I am a shareholder with the law firm of Ropers, Majeski, Kohn & Bentley,
3 attorneys of record for Plaintiffs STEVE TRACHSEL, SUN CITY TOWERS, LLC, THOMAS
4 CIRRITO, ATOCHA LAND, LLC, MICHAEL CIRRITO, and CIRRITO HOLDINGS, LLC.
5 The facts set forth herein are personally known to me or are set forth on the basis of information
6 and belief. If called upon as a witness, I could and would competently testify to these facts.

7 2. Immediately following the filing of the complaint, Plaintiffs had to undertake
8 service of all parties to accord them their right of due process in this matter. Plaintiffs opted to
9 delay filing their ex parte application until after such service was complete, in part, to avoid
10 violating any of the parties' due process rights.

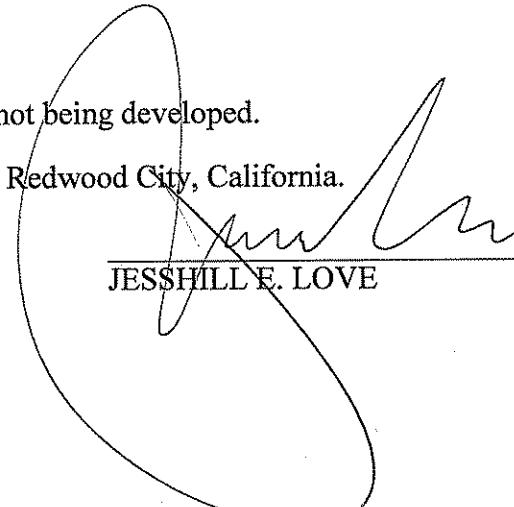
11 3. In April 2008, prior to filing suit in this matter, I first attempted to resolve the
12 matter informally, meeting with Defendants' counsel Andrew August to discuss resolution and a
13 mediation date. When it became clear that Defendants were unavailable until mid- to late July,
14 my clients became concerned that Defendants were simply buying time to sequester the investor
15 funds. Concerned that Plaintiffs' investment funds would be rapidly depleted and relevant
16 information and documentation destroyed, Plaintiffs filed the application without delay.

17 4. Defendants were not qualified to sell securities in either California or with the
18 Securities Exchange Commission at the time they received Plaintiffs' funds for investment
19 purposes. My office performed numerous searches of federal and state databases which
20 determined that Defendants are not, nor at any relevant time have been, qualified to sell
21 securities. Attached hereto as Exhibit "A" are true and correct copies of database search result
22 printouts from the Securities Exchange Commission's EDGAR database, the California
23 Department of Corporations' database, and the Financial Industry Regulatory Authority's
24 BrokerCheck database indicating that Defendants' names were not found on any of these
25 databases as being qualified to sell securities.

26 5. During the early settlement discussions described above, one of the areas Mr.
27 August and I discussed was a guarantee from his clients that they would not execute a deed in lieu
28 of foreclosure in favor of the bank holding the note on the property. This discussion was

1 necessary because the property was not being developed.

2 Executed on June 6, 2008, in Redwood City, California.

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4 JESSHILL E. LOVE

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Ropers Majeski Kohn & Bentley
A Professional Corporation
San Jose

EXHIBIT A

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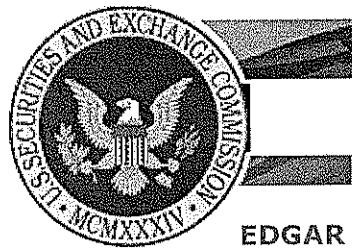
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DEPARTMENT OF
CORPORATIONS
 CALIFORNIA'S INVESTMENT & FINANCING AUTHORITY SINCE 1913

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- » [Marsh & Volk's "Practice Under the California Securities Laws"](#) published by Mathew Bender & Company, Inc., one of the LEXIS Publishing companies.

This three-volume treatise includes, in addition to a history of the California Corporate Securities laws, (1)

a detailed analysis of the Corporate Securities Law of 1968 and Franchise Investment Law, as amended, (2) the text of both laws and the rules promulgated by the California Corporations Commissioner under both laws, (3) a section-by-section commentary on both laws with annotated California Corporations Commissioner's opinions, and (4) copies of all releases issued by the California Corporations Commissioner under both laws.

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On the "Investment Adviser Search" screen, enter the investment adviser's name, CRD number or SEC file number and then follow the instructions for viewing the investment adviser's Form ADV. When checking out your investment adviser, always view the investment adviser's "Registration Status" on Form ADV. The following is a summary of the "Registration Status" you may find for both State and SEC registered investment advisers.

State Registered Investment Advisers

If the investment adviser is registered only with the state(s), the state(s) the investment adviser firm is currently registered with, or was registered in during the previous two years, will be listed. By clicking on any of the states listed, you will be able to view the investment adviser's Form ADV. To check whether the investment adviser currently is registered in a state, click on the "Registration Status" menu item on the side navigation panel. Once you click on the "Registration Status" hyperlink, a screen will appear with the registration status for each state in the following format:

Status Effective Date		
SEC/Jurisdiction	Registration Status	Status Effective Date
Alabama	Termination Requested	12/05/2001
California	Approved	12/12/2001
Florida	Terminated	07/02/2002
Vermont	Revoked	04/05/2002

If you click on the "Registration Status" hyperlink on this screen when you are in the IAPD website, a pop-up window will appear with an explanation of the various registration statuses.

SEC Registered Investment Advisers

- If the firm is, or was, registered with the SEC, a list of state(s) in which the firm is registered or notice filed will not appear. Click on the "Registration Status" menu item on the IAPD website on the side navigation panel to check the jurisdiction(s) in which the firm is registered or notice filed. Once you click on the "Registration Status" hyperlink, a screen will appear with the firm's registration and/or notice filing status with the SEC and each state, as applicable, in the following format:

Registration Status		
SEC/Jurisdiction	Registration Status	Status Effective Date
SEC	Approved	07/03/1991

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Investment adviser firms registered with the SEC may be required to provide to state securities authorities a copy of their Form ADV and any accompanying amendments filed with the SEC. These filings are called "notice filings". Below are the states with which the firm you selected makes its notice filings. Also listed is the date the firm first became notice filed or registered in each state.

SEC/Jurisdiction	Effective Date
California	12/12/2001

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Here are some ways to improve your search:

- a. Check that you have spelled the investment adviser's name correctly.
- b. If you know the investment adviser's IARD/CRD number or SEC "801-" number, enter it.
- c. Select "Starts With", "Sounds Like", or "Contains" on the various name selection boxes so that your search possibly returns more items.
- d. When using the "Starts With" option, enter only the first few letters of the name.
- e. When using the "Contains" option, enter a few characters that may be contained in the name that you are searching for.

2. The investment adviser is not currently registered or has not been registered in the last two years.

This website contains information on investment advisers that currently are registered with the SEC or a state. This website also contains information on investment advisers that were registered in the previous two years but are no longer registered.

This website does not contain information on advisers that:

- 1) Are exempt from registration by law.
- 2) Have filed an application for registration with the SEC or a state, but have not had their registrations approved.

Note: Currently, some investment advisers do not register through the IARD electronic registration system. These investment advisers generally file via paper filings with the states and cannot be found on this IAPD system. Therefore, it is possible that an investment adviser is legally registered with a state but a search on this system will return a "not found" response. If you want to check on an investment adviser's registration status, you should contact the SEC at (202) 551-7250 or contact the appropriate state securities authority through <http://www.nasaa.org>.

3. The investment adviser you are looking for may also be a broker dealer. You can visit the FINRA BrokerCheck at: <http://www.finra.org/BrokerCheck>.



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Check Out Your Broker!

- » For information regarding broker-dealers, broker-dealer agents and investment advisers call (866) 275-2677 or 866 ASK CORP.
- » Check the background of your broker or investment professional by using Financial Industry Regulatory Authority (FINRA) BrokerCheck. [FINRA](#) is also a resource for Investor Alerts and investor education and tools
- » Check out your commodity broker. A free service from the [National Futures Association's Background Affiliation Status Information Center \(BASIC\)](#). Whether you are an investor thinking about opening a futures account or an NFA Member contemplating a new business relationship, BASIC can be a valuable resource for you. BASIC contains Commodity Futures Trading Commission (CFTC) registration and NFA membership information and futures-related regulatory and non-regulatory actions contributed by NFA, the CFTC and the U.S. futures exchanges.
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No Results

Based on the information you provided, no results were found for the broker for whom you searched. This may have occurred because:

1. The broker for whom you are searching is not currently registered with FINRA or has not been registered with FINRA in the last two years. BrokerCheck provides information on brokers that are currently registered or have been registered with FINRA within the last two years.
2. The broker's name and/or CRD Number entered are incorrect.
3. If using the Advanced Search Page, below are some additional helpful hints:
 - o Make sure you entered the CRD Number in the Broker's CRD # field and not in the Firm CRD # field.
 - o Select "Begins With" or "Sounds Like" on the various name fields so that your search returns more results. Enter only the first few letters of the broker's name when using the "Begins With" option to assist with your search.
 - o When using the "Sounds Like" option, enter the characters that sound like the name for which you are searching.
 - o Verify the accuracy of the information provided for the broker's employing firm if you used these fields in your search. Incorrect firm information will result in a "no match" when conducting a broker search.

If you still are not able to find the individual for whom you are searching, call the FINRA BrokerCheck Hotline at (800) 289-9999 to speak with a representative.

To start a new search, select the New Search link in the navigation panel.